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September 15, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 28, 2005

Case Number: TSO-0244

This Decision concerns the eligibility of xxxxxxxxxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should not be restored.

I. BACKGROUND

The individual was stopped for traffic violations in April 2003 and April 1990. After being stopped the police determined that the individual's blood alcohol levels were .138 and .16 and he was arrested for driving under the influence of alcohol (DUI). Following his April 2003 DUI, the individual agreed to the DOE's request that he submit to an evaluation by the DOE consulting psychiatrist. During that October 2004 evaluation the individual "admit[ed] to drinking and driving on what he guessed was a weekly basis."

DOE consulting psychiatrist's report at 8. The DOE consulting psychiatrist's report found the individual is a habitual user of alcohol to excess. DOE consulting psychiatrist's report at 9.

On February 23, 2005 the DOE issued a notification letter to the individual. The notification letter indicated that the individual was twice arrested for DUI, drinks to intoxication one or two times a month and drives while under the influence of alcohol on a weekly basis. The notification letter concludes the individual uses alcohol habitually to excess and the use of alcohol habitually to excess is security concern under 10 C.F.R. §710.8(j) (Criterion J).

The notification letter also indicates that the individual's statements about his alcohol use are often inconsistent. For instance his statement that he drinks two beers a night conflicts with his assertion that he drinks to excess twice a month. Notification letter at Section II.(c) and DOE consulting psychiatrist's report at 8. The notification letter finds that the inconsistencies raise a security concern under 10 C.F.R. §710.8(l) (Criterion L).

In the notification letter, the Manager informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the notification letter. The individual requested a hearing. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (hearing).

The individual's sole basis for challenging the notification letter is his belief that he was not driving under the influence of alcohol when he was arrested in April 2003. Only two witnesses testified at the hearing. The individual testified on his own behalf and the DOE called the DOE consulting psychiatrist.

II. HEARING

A. The DOE Consulting Psychiatrist

The DOE consulting psychiatrist testified that during his evaluation of the individual and during the individual's two PSIs the individual underreported his alcohol consumption and his problems related to alcohol consumption. Transcript of Hearing (Tr.) at 18. He pointed out that the answers on the individual's psychological questionnaire were inconsistent with the information he provided during his two Personnel Security Interviews (PSI). Tr. at 21. He testified:

If the subject's responses to this [psychological] questionnaire are all negative in the face of evidence from the PSIs, and even from my own interview, that would indicate alcohol is a problem, then my skepticism [regarding] the accuracy of [his answers] is raised.

Tr. at 19. As an example, he pointed out that on the psychological questionnaire, the individual answered "no" to the question "Have you tried to cut back on the consumption of alcohol?" During his earlier PSI the individual stated he had recently ceased consuming alcohol for two months. Tr. at 21.

The DOE consulting psychiatrist also testified that despite the two DUIs, the individual continued to believe that alcohol consumption was not a "problem at all." Tr. at 26. He pointed to the individual's statements during his PSIs that he was mistakenly arrested for his first DUI when his car brakes failed and arrested for his second DUI because of his erratic driving caused by his prescription drugs. DOE consulting psychiatrist's report at 2 & 8. Although he recognizes that the individual believes that neither arrest was related to his consumption of alcohol, the DOE consulting psychiatrist is convinced that two DUI arrests are associated with "about a 90-percent chance" that the individual has a lifelong problem with alcohol. Tr. at 19.

The DOE consulting psychiatrist testified that in order for the individual to show rehabilitation from his habitually excessive use of alcohol the individual should reduce his consumption of alcohol to less than two alcohol drinks per day for a period of six months. Tr. at 28.

B. The Individual

It was the individual's position at the hearing that he was not intoxicated at the time of his April 2003 arrest and that the field sobriety and breathalyzer tests gave incorrect results. He believes that his 2003

DUI arrest is the primary basis for the determination of the DOE and the consulting psychiatrist that he uses alcohol habitually to excess. Tr. at 6.

At the hearing the individual's testimony related solely to his April 2003 DUI arrest. He testified that during April 2003 he was pulled over for speeding and that he took a field sobriety test and a breathalyzer test that indicated a blood alcohol level of .138. Despite the detailed police report, the individual does not believe that he was intoxicated. He testified that the blood alcohol reading was erroneous. Tr. at 48. He asserted that he pled guilty to the DUI charge because it would have been difficult and costly to defend himself against the charge and he thought that pleading guilty would put the matter to rest. Tr. at 46.

The individual presented an explanation of why his blood alcohol level reading was .138 and why he failed the field sobriety test. He explained that he had been hunting in the woods and that there were a large number of insects. In order to protect himself, he used a large amount of insect spray. Tr. at 47. These statements are confirmed by the police report which indicates that the police officer smelled the strong odor of "bug spray" when he approached the individual's car. Arresting officer's report, DOE exhibit #15. At the hearing the individual provided a Material Safety Data Sheet for the insect spray. The sheet indicates that 50% of the insect spray by weight is ethanol. Individual's exhibit #1. He testified that he believes the ethanol is the substance that is tested for by the breathalyzer. He testified that his use of insect spray invalidates the breathalyzer test results. Tr. at 48.

The individual also explained that he failed the field sobriety test because of the size of the work boots he was wearing and the fact that the soles on the work boots were not fully connected to the boots. As a result it was difficult for him to walk a straight line. Tr. at 51. At the hearing the individual produced the work boots. The work boots were large and heavy and did have a sole that was partially separated from the boot. Tr. at 51. He also explained that the police officer's observation of blood shot eyes was caused by the insect spray and the fact that he woke up very early that morning. Tr. at 52. Finally, he explained that his slurred speech was caused by rubbing the insect spray on his face. Tr. at 52.

III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer.

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual to bring forth persuasive evidence concerning his eligibility for access authorization. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

This burden is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that

restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to her own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. §710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

IV. ANALYSIS

I do not believe the individual has demonstrated that he was not driving under the influence of alcohol when arrested in April 2003. The individual's claim that his breathalyzer reading was erroneous is based on a material data sheet on insect spray. While the material sheet does indicate that there is ethanol present in the spray, the individual has presented no support for his position that the ethanol in the insect spray is likely to have interfered with the breathalyzer reading. He has not even stated why he believes ethanol in the insect spray could have a significant effect the breathalyzer reading. Therefore, I am unwilling to accept his rationale.

The individual also argues that his work boots caused him to fail the field sobriety test. I believe this contention is not reasonable or believable. Furthermore, I believe the police officer's finding that the individual was intoxicated was reasonably based upon his observation of ". . . poor driving, bloodshot eyes, slurred speech, and poor sobriety test performance." DOE exhibit #15 paragraph 3. The individual's self serving explanations of the police officer's observations do not convince me that the police officer incorrectly interpreted his observations. Therefore, I believe the individual was intoxicated at the time of the field sobriety test.

The individual has not demonstrated that the 2003 DUI arrest and guilty plea were erroneous. The individual has not provided any other support for his claim that he does not use alcohol habitually to excess. Accordingly, the individual has not mitigated the DOE security concern based on the finding that he uses alcohol habitually to excess. Nor has he convinced me that he did not give inconsistent statements about his alcohol use.

V. CONCLUSION

I have concluded that the individual has not mitigated the DOE security concerns under Criteria J and L of 10 C.F.R. § 710.8. In view of the record before me, I am not persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wieker
Hearing Officer
Office of Hearings and Appeals

Date: September 15, 2005